

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

IN THE MATTER OF: ARTICLE 47 (3), 153(1), AND 159 (3) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA AS AMENDED BY THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF: SECTIONS 72 (1) (b), 96(1) (c) (i), 98(c), 99 AND 100 (3) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL RULES STATUTORY INSTRUMENT NO. 60 OF 2016

AND IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTION FOR MUCHINGA WARD IN THE MATERO CONSTITUENCY, MATERO HELD ON 12TH AUGUST, 2021.

BETWEEN:

EDWIN KAFULA

PETITIONER

AND

MUKUPA LEE K

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Before the Honourables F.M. Hamaundu (Chairperson), H. Mdala (Member) and K.S. Banda (Member)

For the Petitioner: Ms. M Mwiinga of Messrs James and Doris Legal Practitioners with Ms. M. Phiri of PNP Advocates

For the 1st Respondent: Mr. L.C Lemba with Ms. N. Nambao of Mulungushi Chambers

For the 2nd Respondent: Mr. H. Mulenga with Mr. L. Mtonga of Philsong and Partners

JUDGMENT

Cases cited

1. Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others (2005) ZR 138
2. Mabenga v Sikota Wina (2003) ZR 10
3. Lewanika and others v. Chiluba (1998) ZR (S.C.)
4. Kamanga v. Attorney General and another (2008) ZR 7
5. Saul Zulu v. Victoria Kalima (2014) ZR 14
6. Lewanika and others v. Chiluba (1998) ZR (S.C.)
7. Richwell Siamunene v Sialubalo Gift Selected Judgment No. 58 of 2017

Legislation referred to

1. Local Government Election Tribunal Rules, Statutory Instrument No. 60 of 2016
2. Electoral Process Act No. 35 of 2016.

Before us is a Petition and an Affidavit verifying facts filed on 25th August, 2021 against the 1st Respondent, Mukupa Lee K and the Electoral Commission of Zambia as 2nd Respondent. This is a Petition relating to the Local Government Election for Muchinga Ward in Matero Constituency, Matero held on 12th August, 2021. The Petitioner subsequently filed an amended Petition on 8th September, 2021.

By the amended Petition and Affidavit verifying facts, the Petitioner's allegations in support of his prayer for the election of the 1st Respondent to be declared void and the Petitioner to be declared duly elected are as follows:

1. That acts of violence, including the use of machetes, planks and burning of motor vehicles, were perpetuated by the 1st Respondent and his agents against the Petitioner and his supporters;
2. That the 1st Respondent was seen distributing campaign materials at night;
3. That the Petitioner and his supporters were not allowed to put on party regalia by the 1st Respondent and his agents;
4. That the 1st Respondent instructed his agents to pull down posters and flags belonging to the Petitioner; and
5. That the 1st Respondent and his agents sneaked in bags of mealie meal with the intention of buying votes from the electorate.

We wish to state that Rule 20 (3) of the Local Government Election Tribunal Rules, Statutory Instrument No. 60 of 2016, allows the Tribunal, at any stage of the proceedings, to make an order requiring evidence to be adduced by Affidavit. During the scheduling conference of the matter, the Tribunal ordered the parties to adduce all evidence of the witnesses to be called by way of Affidavit.

PW1 was the Petitioner himself, Edwin Kafula. In support of his allegations, the Petitioner called one witness while the 1st and 2nd Respondents did not call any witnesses. The Petitioner's evidence in support of the allegations as stated in his Affidavit verifying facts filed on 25th August, 2021, was to the effect that on 14th June, 2021, Patriotic Front party cadres led by the 1st Respondent intended to burn the Petitioner's party's offices located in Muchinga Ward 28. The Petitioner stated that a number of his party's members were badly beaten with planks and machetes on several occasions. In his testimony, the Petitioner also stated that one of the 1st Respondent's agents was caught with offensive weapons at the Petitioner's party's offices. The Petitioner testified that the said Agent had intentions of harming officials who were present at the Petitioner's party's offices. Further, the Petitioner testified that his motor vehicle, Nissan Hard body Registration No. BAC 172, was burnt beyond recognition and as a result, he was disadvantaged because his movements were restricted and he could not go round polling stations on polling day.

The Petitioner stated that he was only availed 22 Gen 20 forms out of 37 which forms represented 37 polling stations. He stated that as a result, the Petitioner and his agents were unable to compare figures accurately. In addition to this, the Petitioner stated that some of his votes were added to the 1st Respondent's votes

at Tiyende Pamozi polling station, room 6. He stated that his agents demanded a recount and it was found that the Petitioner won by a large margin.

The Petitioner testified that the 1st Respondent's party was distributing campaign material at night and there was a video, which went viral, that was recorded showing the same incident. The Petitioner stated that the said incident was reported to the 2nd Respondent through the Petitioner's campaign manager but no action was done by the 2nd Respondent.

The Petitioner stated that his party members were not allowed to wear their party regalia because if they did, they would be brutally assaulted by the 1st Respondent's members. Further, the Petitioner testified that his campaign posters were always pulled down by the 1st Respondent's agents.

In cross examination, the Petitioner was referred to video exhibits EK2, EK3 and EK4 exhibited in the Affidavit verifying facts. The Petitioner said that under EK2, EK3 and EK4 the 1st Respondent did not appear nor was his name mentioned in any of the video exhibits. The Petitioner said that he did not have evidence to show that the person who was caught with offensive weapons at the Petitioner's party's offices was acting at the 1st Respondent's instruction. He further stated that the 1st Respondent's name or his duly appointed agent's name did not come out in the video exhibits.

When asked about the Petitioner's motor vehicle that was burnt, the Petitioner stated that the wreckage was not retrieved. The Petitioner stated that the Gen 20 forms exhibited in the Affidavit verifying facts was his evidence that a recount was done at Tiyende Pamozi polling station, room 6. The Petitioner further said that the word "recount" was not indicated on exhibit "EK5" exhibited in the Affidavit verifying facts. The Petitioner stated that he did not exhibit the video showing the 1st Respondent's party distributing campaign materials at night. He said that the said video existed but he did not know how many people were in the video.

The Petitioner said that the Respondent did give mealie meal to congregants of UCZ Matero Congregation. He stated that he had no record of the number of people who received the mealie meal but it could have been more than a hundred people.

The Respondent stated that he did not know how to lodge a complaint with the 2nd Respondent. He stated that he did not have a copy of any document to show that he had made a report to the 2nd Respondent. The Petitioner stated that he had made a complaint to his campaign manager but he did not file the said complaint. Further, the Petitioner stated that the Gen 20 form is given to polling agents. He stated that he was only told that the Gen 20 forms for the other polling stations had been denied to be given to his polling agent. The Respondent stated that he

did not remember the names of the polling stations where the Gen 20 forms were not received.

In re-examination, the Petitioner stated that his posters and flags were taken down in all places in the Ward except the places near his party's offices as there was 24 hour security at the offices.

PW2 was Prisca Choobe who testified in her Affidavit in verification of Petition filed on 8th September, 2021 that on 10th June, 2021, herself, the Petitioner and other persons were in the field conducting door to door campaigns. She stated that well known supporters of the Patriotic Front began throwing stones at them and their vehicles. She stated that a car driven by Patriotic Front supporters followed the car she was in, which car belonged to the Petitioner, and parked in front of them as they were trying to escape. She stated that she recognised the 1st Respondent in the car that parked in front of them. She then said that she was hit with a panga by one of the Patriotic Front supporters on her left side near her kidney and then she jumped off the car and fell down. She said that she was then hit with a panga on her left hand near her elbow and stepped on by the Patriotic Front supporters who included the 1st Respondent. She said the 1st Respondent went to his car and got a container of an unknown liquid and poured it on the Petitioner's car. The Petitioner's car was set ablaze. PW2 stated that she collapsed at that point and only

found herself at Chingwele Level one Hospital and was later referred to the University Teaching Hospital where she spent three days.

In cross-examination, PW2 stated that she saw Patriotic Front supporters wearing green hoodies. She said that the vehicle she was in was a van and she was seated at the back. She stated that she was able to see the Patriotic Front supporters as she was seated at the edge. She said that she was hit with a panga and stepped on but it was not the 1st Respondent who hit her or stepped on her. She stated that she did not have any documents to show the Tribunal that she was attacked and admitted to hospital. She further stated that she did not bring any evidence before the Tribunal to tie the 1st Respondent to the allegations brought before the Tribunal.

At the conclusion of PW2's testimony, the Petitioner closed his case.

The 1st Respondent relied on the answer and the Affidavit in support of Answer to the Petition filed on 2nd September, 2021 and did not call any witnesses. The 1st Respondent stated that the election had pockets of violence which resulted in the destruction of the 1st Respondent's campaign material and attacks on some of the 1st Respondent's party members. The 1st Respondent stated that the said violence did not affect the outcome of the election. The 1st Respondent testified that he was

the duly elected Councillor for Muchinga Ward 28 in Matero Constituency after emerging victorious in the 12th August, 2021 elections.

In cross-examination, in relation to exhibit "LKM1" in the Affidavit in support of Answer to the Petition filed on 2nd September, 2021, the 1st Respondent said that the exhibit did not link the Petitioner or his party to the commission of the offence. The 1st Respondent said that opposition was allowed to put up posters and roam freely during the campaigns in his ward.

After his testimony, the 1st Respondent closed his case.

The 2nd Respondent relied on the Answer filed and did not call any witnesses.

At the time of writing of this Judgment, only the 2nd Respondent had filed written submissions, as directed, on 14th September, 2021 reflecting its position on the Petition using relevant authorities.

We have considered the Petition, the Answers, replies, affidavits, evidence on record and submissions by Counsel. The following facts are not in dispute and thus proved:

1. That the Petitioner and the 1st Respondent were candidates in the local government election for Muchinga Ward 28 on the United Party for National Development and Patriotic Front ticket respectively. The other candidates

were Kayanda Treza of the Socialist Party, Muthiya Mabvuto K of National Heritage Party and Sizande Trust of Democratic Party.

2. Following the announcement of results, the Returning Officer proceeded to declare the 1st Respondent as the duly elected Councillor for Muchinga Ward 28, Matero Constituency.

The Petitioner seeks to nullify the election of the 1st Respondent as Councillor for Muchinga Ward 28. The Petitioner claims that the 1st Respondent and his agents involved themselves in corrupt, illegal practices and/or other misconducts committed in relation to the Muchinga Ward 28 elections held on 12th August, 2021 against the Constitution and the Electoral Process Act.

Therefore, the issue that is for determination before us is whether on the facts and evidence before us, the Petitioner has proved the allegations raised in the Petition to the required standard to warrant the nullification of the 1st Respondent's election as Councillor for Muchinga Ward 28.

The law that governs the circumstances upon which a local government election can be nullified is contained in **Section 97 (2)** of the **Electoral Process Act No. 35 of 2016**. Section 97 provides as follows:

“97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition,

it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.”

According to **Section 97 (2)** above, it is not enough to show that there was electoral malpractice or misconduct. The malpractice or misconduct must be attributed to

the candidate or his election or polling agent. Further, it must be shown that as a result of the malpractice or misconduct, the majority of the voters were or may have been prevented from electing a candidate whom they preferred.

As regards the burden of proof required in election petitions, in the cases of **Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others (1)**; **Mabenga v Sikota Wina (2)**; **Lewanika and others v. Chiluba (3)**; and **Kamanga v. Attorney General and another (4)**, the Supreme Court stated that election petitions are required to be proven to a standard higher than on a mere balance of probabilities and that the issues raised are required to be established to a fairly high degree of convincing clarity.

In view of the foregoing, we are of the considered view that in order to succeed with this Petition, the Petitioner must prove the allegations raised in his Petition in line with the provisions of the Electoral Process Act set out above to the requisite standard. We shall now turn to consider the grounds raised by the Petitioner in the manner that they have been presented in the Petition and apply the law as set out above.

Allegations against the 1st Respondent

A. Violence against the Petitioner and his supporters

We have given careful consideration to the submissions of the parties as well as the video exhibits and other evidence on record. The allegations of violence against the Petitioner as contained in paragraphs 3, 4 and 5 of the Petition are very specific and clear. Our understanding is that the Petitioner alleges that the violence which occurred was perpetuated by the 1st Respondent.

Though, there were incidences of violence in Muchinga Ward, we state that there is no evidence to show that the 1st Respondent was connected to the said incidences. In his evidence, the Petitioner stated that he had no evidence to prove that the violent incidences occurred as a result of the 1st Respondent's doing or that the perpetrators were acting at the instruction of the 1st Respondent. Further, PW2 testified that the people who attacked her did not include the 1st Respondent. PW2 also stated that she did not have evidence to tie the 1st Respondent to the attack.

We state that the Petitioner's evidence in an election petition must support the pleadings as indicated in the Petition filed. In the case of **Saul Zulu v. Victoria Kalima (5)**, the Court held:

"The Petitioner is not allowed to bring in any evidence other than the evidence which is connected to the pleadings and goes to support those pleadings. Put simply, pleadings in an election petition are allegations by the Petitioner against

the Respondent(s). What this means is that the Petitioner cannot go at sea, the Petitioner is restricted only to the evidence which is supportive of the allegations outlined in the petition. If the Petitioner or indeed any witness for the Petitioner adduces evidence which does not support the pleadings then that evidence is irrelevant and inadmissible to the extent of its irrelevancy."

On the authority of the **Saul Zulu** case stated above, we must look out for any evidence which supports the pleadings as indicated in the Petition filed. We have carefully perused the record and having viewed and scrutinised the video exhibits EK2, EK3, and EK4 availed to us regarding the allegations of violence, we find that there is no evidence supporting the allegations as stated in paragraphs 3, 4 and 5 of the Petition. We further find that there is no evidence connecting the 1st Respondent to the violence as alleged by the Petition.

Under section 97(2) (a) (ii) of the Act, an election can be annulled on account of a corrupt or illegal practice or other misconduct committed in connection with the election "with the knowledge and consent or approval of a candidate or of that of a candidate's agent or polling agent." Having found that the 1st Respondent was not connected to the allegations stated in paragraphs 3, 4 and 5 of the Petition, the next question that arises is whether the persons involved in the alleged violence were acting at the instruction of the 1st Respondent or with his consent or were his

duly appointed agents as required by section 97 (2) (a) (ii) of the Electoral Process Act stated above.

The Supreme Court in the case of **Lewanika and others v. Chiluba (6)** held:

"...a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since...an election agent has to be specifically so appointed."

Section 2 of the **Electoral Process Act** defines "election agent" as:

"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."

We state that it was pertinent for the Petitioner to show that the persons involved in the alleged violent acts were legitimate election agents of the 1st Respondent as defined by the **Electoral Process Act**. That cadres or supporters of the party the 1st Respondent belongs to were implicated in the incidences is not enough to attach responsibility to the 1st Respondent or his duly appointed election agents and to annul the election on the basis of **Section 97(2)(a)(ii)** of the Act. In **Richwell Siamunene v Sialubalo Gift (7)**, the court said:

"Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.

Our firm view is that, in the circumstances of the instant case, the threshold in **Section 97(2) (a) (ii)** aforesaid was not reached. We find that the Petitioner did not adduce any evidence to show that the perpetrators of the violence acted with the consent of the 1st Respondent or that they were the 1st Respondent's duly appointed election agents. Therefore, we find that the Petitioner failed to prove that the 1st Respondent or his duly appointed agent committed a corrupt practice, illegal practice or misconduct.

B. Allegations of mutilation and destruction of posters and flags; hindrance to wear party regalia

The Petitioner stated that he had his posters and flags in areas around Muchinga Ward 28 but the same were removed except those near his party's offices as there was 24 hour security. He stated that himself and his members were prevented from

wearing their party regalia as they would be attacked whenever they did so. We state that the Petitioner did not call any other witnesses to attest to these allegations; the evidence adduced in support of this allegation comprised only of the Petitioner's testimony. We find that the Petitioner failed to provide any evidence to prove that these incidences actually occurred, moreover, that the 1st Respondent committed the said allegations or his duly elected agent. This Tribunal therefore finds that the Petitioner has failed to prove the allegation that the 1st Respondent committed a corrupt practice, illegal act or other misconduct by the destruction of posters and prevention of putting on party regalia.

C. Vote buying

Allegations of vote buying are contained in paragraphs 11 and 12 of the amended petition. The petitioner stated that the alleged acts of vote buying were committed by the 1st Respondent and another person known as Edith Nawakwi. He alleges that the 1st Respondent distributed mealie meal at a church where most members of the said church collected the mealie meal. In cross examination, the Petitioner said that he did not know the exact number of people who got the mealie meal but he said that it could have been more than a 100 people.

It is our considered view that the petitioner did not adduce any evidence to show, firstly, that the 1st Respondent and the said Edith Nawakwi distributed mealie meal.

Secondly, that even if the mealie meal was distributed, the 1st Respondent was doing so to solicit for votes in the election. A scrutiny of the evidence on record shows that the petitioner did not call any witnesses to substantiate the allegation that the 1st Respondent distributed mealie meal at a church. He further failed to prove that the distribution of the mealie meal was so widespread as to affect his election result because of the number of people who allegedly received the mealie meal. In the absence of independent evidence to support this allegation, we find that the petition has failed to prove the allegations as contained in paragraph 11 of the amended petition. This Tribunal therefore finds that the Petitioner has failed to prove the allegation that the 1st Respondent committed a corrupt practice, illegal act or other misconduct by the distribution of mealie-meal to congregants at a church.

Allegations against the 2nd Respondent

The evidence of the petitioner against the 2nd Respondent is as contained in paragraphs 10 and 12 of the affidavit verifying petition. The petitioner states that the 2nd Respondent did not avail him the required number of Gen 20 forms for 37 polling stations and as a result, he failed to compile his figures accurately. The petitioner stated that he demanded a recount of some votes which were mixed up the 1st Respondent's votes. Further that a member of the 1st Respondent's party

was seen distributing campaign materials at night and a video went viral to that effect. The petitioner stated that the same was reported to the 2nd Respondent through the Petitioner's campaign manager but the 2nd Respondent took no action.

During cross-examination, the petitioner said that Gen 20 is a document which is given to polling agents. He stated that he was only told that the Gen 20 was not availed to his polling agents by the 2nd Respondent. He further said that he did not remember the name of the polling station where his polling agents did not receive the Gen 20 forms. The petitioner further stated that he did not know how to make a formal report to the 2nd Respondent and he did not have a copy of any formal document to show that a report was made. The petitioner further stated that he did not have a screenshot of the conversation between himself and his campaign manager concerning the allegation that the 1st Respondent was distributing campaign materials at night.

We note that the Petitioner did not call any witnesses to support his allegations against the 2nd Respondent. We find that the Petitioner did not adduce sufficient evidence to show that he made a written complaint or made a report to the 2nd Respondent in accordance with the provisions of the **Electoral Process Act**. We further find that the evidence adduced by the petitioner with regard to the Gen 20

forms was hearsay as he was merely told of the incident and did not witness it for himself.

In conclusion, the Tribunal finds that the Petitioner has failed to prove to the satisfaction of this Tribunal that the 1st Respondent was not a duly elected Councillor of Muchinga Ward 28 as he has failed to provide convincing evidence that the 1st Respondent or his agent (with the knowledge and consent of the 1st Respondent:

1. Committed a corrupt practice, illegal practice or other misconduct and as a result the majority of voters of Muchinga Ward 28 were or may have been prevented from electing the candidate they preferred; and
2. That there was any non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections.

We therefore hold that the 1st Respondent was duly elected to the office of Councillor for Muchinga Ward 28.

On the issue of costs, we are guided by the case of **Anderson Kambela Mazoka case stated above (1)** in which the Supreme Court said the following:

“As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and

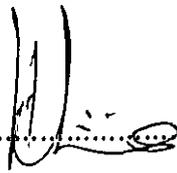
which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.”

We adopt the reasoning of the Court as our own and order that each party bears their own costs.

Petition is dismissed.

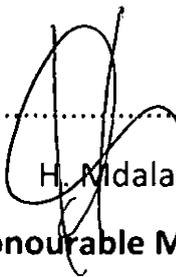
We direct the parties’ attention to Rule 24 of the Tribunal Rules allowing an appeal to the Constitutional Court within 14 days of this decision.

Dated the day of September 2021.



Hon F.M. Hamaundu

Chairperson



H. Ndala
Honourable Member



K.S. Banda
Honourable Member